



**PATENT**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of : Michael H. Peronek, et al.  
For : PLASTIC WATER BOTTLE  
Serial No. : 10/680,510  
Filing Date : October 7, 2003  
Examiner : Tri M. Mai  
Group Art Unit : 3727  
Date of Last Action : August 10, 2005  
Our Docket : FCIE 2 13320-1

**APPEAL BRIEF**

Mail Stop Appeal  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

Dear Sir:

This is an appeal from the decision of the examiner dated August 10, 2005, finally rejecting the claims in the above-identified patent application. Pursuant to 37 CFR 41.20(b)(2), the fee for filing the Appeal Brief is \$250.00. The required fee is enclosed herewith. If the submitted fee is insufficient for the Appeal Brief, the Commissioner is authorized to charge any fee which may be required, or credit any overpayment to Deposit Account No. 06-0308.

**I. REAL PARTY IN INTEREST**

FCI, INC. having place of business at 4661 Giles Rd., Cleveland, Ohio 44135 is the real party in interest as evidenced by Reel/Frame 012620/0648.

09/16/2005 ZJUHAR1 00000041\_10680510

01 EC:1402

500.00 OP

250.00 OP

09/19/2005 ZJUHAR1 00000017\_10680510

02 FC:2402

## **II. RELATED APPEALS AND INTERFERENCES**

There are no related appeals or interferences.

## **III. STATUS OF CLAIMS**

The above-identified patent application presently contains claims 28-84. Claim 28, 51 and 74 are sole independent claims. Claims 1-27 were canceled by Appellant during the prosecution of the patent application. Claims 43-50, 66-73, 77 and 78 were withdrawn, but not canceled, by Appellant. Appellant requested the examiner to reconsider the withdrawn claims once an independent claim had been allowed.

The examiner in the Final Office Action rejected claims 77 and 78 under 35 U.S.C. §112(1) as failing to comply with the written description requirement. Claims 38-42, 51-65 and 74-84 were rejected under 35 U.S.C. §112(2) as indefinite for failing to particularly point out and distinctly claim the subject matter of the invention. Claims 28-31, 40, 42, 51, 52, 57, 63, 65, 74-76 and 79 were rejected under 35 U.S.C. §102(b) as being anticipated by Prevot et al. 5,887,739 (Prevot). Claims 38 and 61 were rejected under 35 U.S.C. §103(a) as being unpatentable over Prevot in view of Collette 4,755,404 (Collette) or the admitted prior art (APA). Claims 28-42, 51-65 and 74-84 were rejected under 35 U.S.C. §103(a) as being unpatentable over Collette in view of either Pree D192,942 (Pree) or Japanese Publication No. 6-247432 (JP-432). Claims 28-37, 42, 51-60, 65 and 74-78 were rejected under 35 U.S.C. §103(a) as being unpatentable over Japanese Publication No. 61-93093 (JP-093) in view of either Pree or JP-432. Claims 38-41, 61-64 and 82-84 were rejected under 35 U.S.C. §103(a) as being unpatentable over JP-093 in view of Collette or the APA.

Claims 28-42, 51-65, 74-76 and 79-84 are the subject of this Appeal. Appellant has included the appealed claims in the Appendix of Claims.

#### **IV. STATUS OF AMENDMENTS**

Appellant mailed an Amendment After Final on September 8, 2005 which withdrew claims 77 and 78.

#### **V. SUMMARY OF CLAIMED SUBJECT MATTER**

The claimed invention is directed to a novel molded plastic container that includes a non-circular anti-rotation flange that is designed to at least partially inhibit full rotation of the container during the capping of the container. The patent application currently includes three independent claims, namely independent claims 28, 51 and 74. Claims 29-42 directly or ultimately depend from independent claim 28. Claims 52-65 directly or ultimately depend from independent claim 51. Claims 75, 76 and 79-84 directly or ultimately depend from independent claim 74. None of the dependent claims are mean-plus-function claims.

##### **A. INDEPENDENT CLAIM 28**

Independent claim 28 is directed to a molded plastic container 160. (See Figs. 5, 6A, 6B, 7 and 9). The plastic container includes an upper mouth-forming portion 162 (P. 6, lns. 12-25; P. 16, lns. 26-27; ), a lower base-forming portion 190 (P. 4, lns. 24-27; P. 17, ln. 1) and a substantially cylindrical sidewall portion 184 extending between the upper mouth-forming portion and the lower base portion (P. 4, lns. 17-19; P. 16, ln. 27 - P. 17, ln. 1). The upper mouth-forming portion includes a neck that has at least one thread 168 which is designed to secure a cap 180 to the upper mouth forming portion. (P. 17, lns. 1-7). The upper mouth forming portion also includes a non-circular anti-rotation flange 170 that is designed to at least partially inhibit full rotation of the container as the cap is inserted on the container. (P. 17, lns. 8-27). The non-circular anti-rotation flange 170 includes an outer peripheral edge that is at least partially formed of a plurality of substantially straight surfaces totaling an odd number. (P. 17, lns. 13-17). The straight surfaces on the peripheral

edge of the non-circular anti-rotation flange are symmetrically oriented the non-circular anti-rotation flange. (P. 7, ln. 26 - P. 8, ln. 3; See Figs. 1, 3, 6A, 6B & 7).

#### **B. INDEPENDENT CLAIM 51**

Independent claim 51 is directed to a molded plastic container 160. (See Figs. 5, 6A, 6B, 7 and 9). The plastic container includes an upper mouth-forming portion 162 (P. 6, lns. 12-25; P. 16, lns. 26-27; ), a lower base-forming portion 190 (P. 4, lns. 24-27; P. 17, ln. 1) and a substantially cylindrical sidewall portion 184extending between the upper mouth-forming portion and the lower base portion (P. 4, lns. 17-19; P. 16, ln. 27 - P. 17, ln. 1). The upper mouth-forming portion includes a neck having a substantially circular cross-sectional shape. (P. 6, lns, 16-17; See Figs. 3, 5, 6A, 6B, & 7). The upper mouth-forming portion also includes a neck that has at least one thread 168 which is designed to secure a cap 180 to the upper mouth forming portion. (P. 17, lns. 1-7). The upper mouth forming portion further includes a non-circular anti-rotation flange 170 that at least partially extends outwardly from the neck and is designed to at least partially inhibit full rotation of the container as the cap is inserted on the container. (P. 17, lns. 8-27; See Figs. 5, 6A, 6B & 7). The non-circular anti-rotation flange 170 includes an outer peripheral edge that is at least partially formed of a plurality of substantially straight surfaces totaling an odd number and a plurality of apexes which also total an odd number. (P. 17, lns. 13-17; See Figs. 3, 6A, 6B, & 7). Each of the apexes on the outer peripheral edge are formed by the ends of two of the substantially straight surfaces that are positioned adjacent to one another. (See Figs. 3, 6A, 6B, & 7). At least one of the apexes is diametrically opposed from a center of at least one of the substantially straight surfaces. (See Figs. 3, 6A, 6B, & 7).

### **C. INDEPENDENT CLAIM 74**

Independent claim 74 is directed to a molded plastic container 160. (See Figs. 5, 6A, 6B, 7 and 9). The plastic container includes an upper mouth-forming portion 162 (P. 6, lns. 12-25; P. 16, lns. 26-27; ), a lower base-forming portion 190 (P. 4, lns. 24-27; P. 17, ln. 1) and a substantially cylindrical sidewall portion 184extending between the upper mouth-forming portion and the lower base portion (P. 4, lns. 17-19; P. 16, ln. 27 - P. 17, ln. 1). The upper mouth-forming portion includes a neck having a substantially circular cross-sectional shape. (P. 6, lns, 16-17; See Figs. 3, 5, 6A, 6B, & 7). The upper mouth-forming portion also includes a neck that has at least one thread 168 which is designed to secure a cap 180 to the upper mouth forming portion. (P. 17, lns. 1-7). The upper mouth forming portion further includes a non-circular anti-rotation flange 170 that at least partially extends outwardly from the neck and is designed to at least partially inhibit full rotation of the container as the cap is inserted on the container. (P. 17, lns. 8-27; See Figs. 5, 6A, 6B & 7). The non-circular anti-rotation flange 170 includes an outer peripheral edge that is at least partially formed of a plurality of substantially straight surfaces totaling an odd number. (P. 17, lns. 13-17; See Figs. 3, 6A, 6B, & 7). The straight surfaces on the peripheral edge of the non-circular anti-rotation flange are symmetrically oriented the non-circular anti-rotation flange and have substantially the same length. (P. 7, ln. 26 - P. 8, ln. 3; See Figs. 1, 3, 6A, 6B & 7).

### **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

Claims 38-42, 51-65, 74-76 and 79-84 stand rejected under 35 U.S.C. §112(2) as being indefinite for failing to particularly point out and distinctly claim the subject matter of the invention.

Claims 28-31, 40, 42, 51, 52, 57, 63, 65, 74-76 and 79 stand under 35 U.S.C. §102(b) as being anticipated by Prevot et al. 5,887,739.

Claims 38 and 61 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Prevot et al 5,887,739 in view of Collette 4,755,404 or the admitted prior art.

Claims 28-42, 51-65, 74-76 and 79-84 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Collette 4,755,404 in view of either Pree D192,942 or Japanese Publication No. 6-247432.

Claims 28-37, 42, 51-60, 65 and 74-76 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Japanese Publication No. 61-93093 in view of either Pree D192,942 or Japanese Publication No. 6-247432.

Claims 38-41, 61-64 and 82-84 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Japanese Publication No. 61-93093 in view of Collette 4,755,404 or the admitted prior art.

## **VII. ARGUMENT**

### **A. THE FIRST ISSUE**

The examiner's final rejection of claims 38-42, 51-65 and 74-84 under 35 U.S.C. §112(2) is in error. Appellant submits that the claim language of relating to the straight surfaces and apexes being symmetrically oriented about the non-circular anti-rotation flange is 1) supported by the originally filed drawings and specification and 2) not inconsistent language when describing the configuration of the non-circular anti-rotation flange. Appellant also submits that the claim language relating to the outer peripheral edge of the non-circular anti-rotation flange being at least partially formed of a plurality of substantially straight surfaces totaling an odd number is 1) supported by the originally filed drawings and specification and 2) clearly defines the configuration of the non-circular anti-rotation flange.

Appellants submit that the claims pending in the above identified patent application are definite and particularly point out and distinctly claim the subject matter which Appellants regard

as the invention. It is respectfully submitted that the examiner's final rejection of claims 38-42, 51-65 and 74-84 under 35 U.S.C. §112(2) is in error and should be reversed.

### **1. Symmetrical Orientation of Straight Surfaces and Apexes**

The examiner's rejection of the claims under 35 U.S.C. §112 (2) is based on the erroneous conclusion that an odd number of straight surfaces ("Flanges" as termed by the examiner) and apexes cannot be symmetrically oriented about the peripheral edge of the non-circular anti-rotation flange.

The originally filed specification and drawings disclose a plastic container 160 that includes a non-circular anti-rotation flange 170. (See Figs. 1, 3, 4, 5, 6A-B, 7 & 8A-B). The outer peripheral edge of the non-circular anti-rotation flange includes a plurality of substantially straight sides 176. (See Figs. 1, 3, 4, 5, 6A-B, 7 & 8A-B). The total number of substantially straight sides 176 that are on the outer peripheral edge of the non-circular anti-rotation flange equals an odd number. (See P. 7, ln. 24 - P. 8, ln. 3; P. 17, lns. 13-17; P. 18, lns. 4-11; Figs. 1, 3, 4, 5, 6A-B, 7 & 8A-B). As best illustrated in Figures 3, 6A-B and 7, the outer peripheral edge of the non-circular anti-rotation flange includes seven substantially straight sides 176. The number seven is an odd number. The seven substantially straight sides 176 are also the same length and are symmetrically oriented with respect to one another. As shown in Figures 3, 6A-B and 7, the ends of adjacently positioned substantially straight sides contact one another to form an apex. Seven apexes are formed on the outer peripheral edge of the non-circular anti-rotation flange Figures 1, 3, 4, 5, 6A-B & 7. Since the substantially straight sides 176 are the same length, both the substantially straight sides and the apexes formed by these sides are symmetrically oriented with respect to one another about the peripheral edge of the non-circular anti-rotation flange.

Appellants submit that the examiner's objection to the claim language relating to the straight surfaces and apexes being symmetrically oriented about the non-circular anti-rotation flange is

unfounded and should be withdrawn.

**2. Outer Peripheral Edge of the Non-Circular Anti-Rotation Flange Being at Least Partially Formed of a Plurality of Substantially Straight Surfaces Totaling an Odd Number**

The examiner's rejection of claims 28, 51 and 74 under 35 U.S.C. §112 (2) is based on the erroneous conclusion that the periphery of the anti-rotation flange cannot be at least partially formed of an odd number of straight surfaces. Indeed, Figures 3, 6A-B, 7 & 8A-B illustrate such an anti-rotation flange. The periphery of each of the anti-rotation flanges is formed by an odd number of substantially straight surfaces 174. The ends of each of the substantially straight surfaces 174 terminate into a curved apex. The curved apex is not straight. As such, the periphery of the anti-rotation flange as illustrated in Figures 3, 6A-B, 7 & 8A-B is formed of an odd number of substantially straight surfaces and an odd number of non-straight surfaces.

Although it is not entirely clear from the examiner's rejection, Appellant believes that the examiner is attempting to create confusion regarding the claim language by asserting that structures other than substantially straight surfaces 174 on the anti-rotation flange could be considered straight surfaces; however, the examiner has not explicitly stated as such. For instance, if the examiner is attempting to assert that a non-curved surface such as part of notch 200 or 202 as illustrated in Figures 8D and 8E can be considered as substantially straight surfaces as defined in the claims, then the examiner is attempting to interpret the claims contrary to the terms used in the specification. All the structures that make up notch 200 or 202 relate solely to the notch, not the substantially straight surface. Indeed, the notch structure is a separately defined structure as defined in claims 45, 46, 68, 69, 77 and 78, which claims have been withdrawn by election in this patent application.

Appellants submit that the examiner's objection to the claim language relating to the outer peripheral edge of the non-circular anti-rotation flange being at least partially formed of a plurality

of substantially straight surfaces totaling an odd number is unfounded and should be withdrawn.

## B. THE SECOND ISSUE

The examiner's final rejection of claims 28-31, 40, 42, 51, 52, 57, 63, 65, 74-76 and 79 under 35 U.S.C. §102(b) as being anticipated by Prevot et al (5,887,739) is in error. Prevot does not disclose or teach the molded plastic container defined in claims 28-31, 40, 42, 51, 52, 57, 63, 65, 74-76 and 79.

### 1. **Prevot Does Not Disclose or Teach the Claimed Invention**

Appellant submits that Prevot does not disclose or teach a molded plastic container that satisfies all the limitations of independent claims 28, 51 and 74. Appellant further submits that the limitations in dependent claims 29-31, 52, 57, 75, 76 and 79 are also not taught or disclosed by Prevot.

A claim is not anticipated under 35 U.S.C. §102 unless each element and limitation of the claim was known or used by others before it was invented by the patentee. *Hoover Group v. Custom Metalcraft*, 36 USPQ2d 1101, 1103 (Fed. Cir. 1995). (Emphasis added). In other words, invalidity by anticipation requires that the four corners of a single, prior art document describe every element of the claimed invention, either expressly or inherently, such that a person of ordinary skill in the art could practice the invention without undue experimentation. *Atlas Powder Co. v. Ireco Inc.*, 51 USPQ2d 1943, 1947 (Fed. Cir. 1999); *In re Paulsen*, 31 USPQ2d 1671, 1673 (Fed. Cir. 1994).

As will be established below, the examiner has not properly established that Prevot discloses and teaches every element of any of the pending claims.

### 2. **Non-Anticipated Independent Claims**

Independent claims 28, 51 and 74 all include the limitation that the molded plastic bottle include an upper mouth forming portion that includes a neck that has 1) at least one thread and 2)

a non-circular anti-rotation flange that is formed of a plurality of substantially straight surfaces totaling an odd number. Applicant submits that this structure is not disclosed or taught by Prevot. For this reason alone, independent claims 28, 51 and 74 and all the claims dependent therefrom are not anticipated by Prevot.

Prevot discloses a container 10 that includes a dome 12 on the upper portion of the container. This dome includes a thread 14 and a top opening 16. Positioned below the dome is a label bumper 24. Prevot discloses that the unique feature of the container is the plurality of pairs of chordal stiffening facets 30 extending transversely about the dome. The stiffening facets are designed to enhance the top loading capabilities of the container and prevent distortion of the dome while the container is top loaded. (Col. 3, lns. 22-24; Col.3, ln. 61 - Col.4, ln. 10).

Prevot does not disclose, teach or suggest the dome being used to prevent rotation of the container during the capping of the container. For this reason alone, Prevot does not anticipate any of the claims on appeal.

Prevot also does not disclose an anti-rotation flange that has an outer peripheral edge which includes an odd number of substantially straight surfaces. The examiner asserted that tier 44 of dome 12 includes a flange. It is unclear from the examiner's comments whether each facet 30 is considered to be the anti-rotation flange or all the facets of tier 44 are to be considered the anti-rotation flange. Irrespective of how the examiner is interpreting the structures on dome 12, these structures do not meet the limitations of the independent claims on appeal. For instance, if each facet 30 considered the anti-rotation flange, the facet does not include a plurality of substantially straight surfaces on the peripheral edge of the facet. Indeed, walls 32 and 34 of each facet 44 form two curved outer edges. (See Figs.2-6). As such, the peripheral edges of the walls are not straight and do not constitute an odd number of straight surfaces. Alternatively, if all of the facets 30 of tier 44

are considered to form the anti-rotation flange, the outer peripheral edge of tier 44 does not include any straight edges. The peripheral edge of wall 34 would constitute the outer peripheral edge of the anti-rotation flange. As discussed above, the outer edge of wall 34 is curved, not straight. For at least these additional reasons, Prevot does not anticipate any of the claims on appeal.

Independent claim 24 includes the additional limitation the substantially straight surfaces on the outer peripheral edge of the anti-rotation flange are symmetrically oriented about the anti-rotation flange. As set forth above, Prevot does not disclose or teach a plurality of substantially straight surfaces on the outer peripheral edge of the anti-rotation flange. As such, Prevot cannot and does not disclose or teach a plurality of substantially straight surfaces that are symmetrically oriented on the outer peripheral edge of the anti-rotation flange. For at least these further reasons, Prevot does not anticipate independent claim 24 and any claim dependent therefrom.

Independent claim 51 includes additional limitations directed to a plurality of apexes that total an odd number and which are portioned on the outer peripheral edge of the anti-rotation flange and formed by the ends of two adjacent portioned straight surfaces. Claim 51 also includes the limitation that at least one of the apexes is portioned on the outer peripheral edge of the anti-rotation flange such that it is diametrically opposed to a center of a substantially straight surface. Prevot does not disclose or teach any type of apexes on the anti-rotation flange. Prevot also or alternatively does not disclose or teach a plurality of apexes that are formed on the outer peripheral edge of the anti-rotation by two ends of adjacently positioned substantially straight surfaces. Prevot also or alternatively does not disclose or teach an apex that is diametrically opposed to a substantially straight surface that is positioned on the outer peripheral edge of the anti-rotation flange. For at least these further reasons, Prevot does not anticipate independent claim 51 and any claim dependent therefrom.

Independent claim 74 includes the additional limitations that the anti-rotation flange at least partially extends outwardly from the neck of the container and each of the substantially straight surfaces are substantially the same length. Prevot is absent a disclosure or teaching for either of these limitations. The facets, arguably not even on the neck of container 10, do not extend outwardly from the neck. Indeed, the facets are formed in the neck as illustrated in Figures 1-6. Furthermore, the individual facets do not include a substantially straight surface on the outer peripheral edge of an anti-rotation flange as discussed above. As such, Prevot cannot disclose or teach substantially straight surfaces that all have the same length. For at least these further reasons, Prevot does not anticipate independent claim 74 and any claim dependent therefrom.

### **3. Non-Anticipated Dependent Claims**

As set forth above, all three independent claims on appeal are not anticipated by Prevot. As such, all the claims dependent from these independent claims are also not anticipated by Prevot. Appellant further submits that the limitations of dependents 29-31, 52, 57, 75, 76 and 79 are also not disclosed or taught by Prevot.

Dependent claims 29 and 52 include the limitations that 1) each substantially straight surface has the same length and 2) all of the substantially straight surfaces are symmetrically oriented about the anti-rotation flange. As discussed above with respect to independent claim 74, Prevot does not disclose or teach substantially straight surfaces that all have the same length which are portioned on the outer peripheral edge of the anti-rotation flange. Prevot, since it does not disclose or teach substantially straight surfaces on the outer peripheral edge of the anti-rotation flange, also does not disclose or teach substantially straight surfaces are symmetrically oriented about the anti-rotation flange. For at least these additional reasons, Prevot does not anticipate dependent claims 29 and 52.

Dependent claims 30, 31 and 75 include the limitation that each of the substantially straight

surfaces have two ends and that a plurality of the substantially straight surfaces have at least one of the ends engaging an end of an adjacently positioned substantially straight surface. As illustrated in Figures 1-6 of Prevot, each of the facets are spaced from one another, thus no structure on each of the facets engages one another. As discussed above, each of the facets do not include a plurality of substantially straight surfaces. As such, the facets individually nor in combination disclose or teach the limitation of dependent claims 30, 31 and 75. For at least these additional reasons, Prevot does not anticipate dependent claims 30, 31 and 75.

Dependent claims 57 and 76 include the limitations that at least two of the apexes on the peripheral edge of the anti-rotation flange are diametrically opposed from a center of at least two of the substantially straight surfaces. As discussed above with respect to independent claim 51, Prevot does not disclose or teach apexes or that any of the apexes are diametrically opposed from a center of a substantially straight surface. For at least these additional reasons, Prevot does not anticipate dependent claims 57 and 76.

Dependent claim 79 includes the limitations that 1) the upper mouth-forming portion includes a frustoconical transition portion extending between the substantially cylindrical sidewall portion and the neck and 2) the neck has a substantially circular cross-sectional shape. As defined in claim 74, the anti-rotation flange is positioned on the neck. As such, dependent claim 79 requires the frustoconical transition portion to not include the anti-rotation flange to not extend above the anti-rotation flange. Prevot discloses the only frustoconical transition portion of container 10 includes tires 42 and 44 that include the facets. Although it is unclear how the examiner is using the facets to support a rejection of any of the claims on appeal as discussed above, position of the facets on container 10 cannot satisfy the limitation of dependent claim 79. For at least these additional reasons, Prevot does not anticipate dependent claim 79.

## C. THE THIRD ISSUE

The examiner's final rejection of claims 38 and 61 under 35 U.S.C. §103(a) as being unpatentable over Prevot et al. 5,887,739 in view of either Collette 4,755,404 or the admitted prior art is in error. Prevot in combination with either Collette or the APA does not disclose, teach or suggest the molded plastic container as defined in claims 38 and 61.

### **1. Prevot in combination with Collette or the Admitted Prior Art Do Not Disclose, Teach or Suggest the Claimed Invention**

Appellant submits that Prevot combined with either Collette or the APA do not disclose, teach, or suggest a molded plastic container that satisfies all the limitations of claims 38 or 61.

To reject claims in an application under 35 U.S.C. §103, there must be a showing of an unrebutted *prima facie* case of obviousness. *In re Deuel*, 34 USPQ2d 1210, 1214 (Fed. Cir. 1995). In the absence of a proper *prima facie* case of obviousness, an inventor who complies with the other statutory requirements is entitled to a patent. *Oetiker*, 24 USPQ2d at 1444.

Section 103 specifically requires consideration of the claimed invention "as a whole." *Ruiz v. A.B. Chance Co.*, 69 USPQ2d 1686, 1690 (Fed. Cir 2004). Inventions typically are new combinations of existing principles or features. *Env'l. Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 698 (Fed. Cir. 1983) (noting that "virtually all [inventions] are combinations of old elements."). As such, most, if not all, inventions arise from a combination of old elements. *In re Rouffet*, 47 USPQ2d 1453, 1457 (Fed. Cir. 1998). Consequently, identification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention. *Id.* The "as a whole" instruction in Title 35 prevents evaluation of the invention part by part. *Ruiz*, 69 USPQ at 1690. Without this important requirement, an obviousness assessment might break an invention into its component parts (A + B + C), then find a prior art reference containing A, another containing B, and

another containing C, and on that basis alone declare the invention obvious. *Id.* This form of hindsight reasoning, using the invention as a roadmap to find its prior art components, would discount the value of combining various existing features or principles in a new way to achieve a new result--often the very definition of invention. *Id.*

Section 103 precludes this hindsight discounting of the value of new combinations by requiring assessment of the invention as a whole. *Id.* A rejection under Section 103 also requires a showing that an artisan of ordinary skill in the art at the time of invention, confronted by the same problems as the inventor and with no knowledge of the claimed invention, would select the various elements from the prior art and combine them in the claimed manner. *Id.* In other words, the examiner must show some suggestion or motivation, before the invention itself, to make the new combination. *Rouffet*, 47 USPQ2d at 1456; *Dance*, 48 USPQ2d at 1637; *In re Gordon*, 221 USPQ 1125, 1127 (Fed. Cir. 1984). Without such teachings, the claims pending in the above-identified patent application cannot be shown to be invalid for obviousness. *Gambro Lundia AB v. Baxter Healthcare Corp.*, 42 USPQ2d 1378, 1383 (Fed. Cir. 1997) (absence of a suggestion to combine is dispositive of an obviousness determination).

A critical step in analyzing the patentability of claims pursuant to 35 U.S.C. §103(a) is casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom in the field. *Dembiczak*, 50 USPQ2d at 1617. When the art in question is relatively simple, the opportunity to judge by hindsight is particularly tempting. Close adherence to this methodology is especially important in cases where the very ease with which the invention can be understood may prompt one "to fall victim to the insidious effect of a hindsight syndrome wherein that which only the invention taught is used against its teacher." *Id.*

The best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references." *Id. See also C.R. Bard, Inc. v. M3 Sys., Inc.*, 48 USPQ2d 1225, 1232 (Fed. Cir. 1998) (describing "teaching or suggestion or motivation [to combine]" as an "essential evidentiary component of an obviousness holding"); *Rouffet*, 47 USPQ2d at 1459 ("the Board must identify specifically . . . the reasons one of ordinary skill in the art would have been motivated to select the references and combine them"); *In re Fritch*, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992) (The examiner can satisfy burden of obviousness in light of combination "only by showing some objective teaching [leading to the combination]"); *In re Fine* , 5 USPQ2d 1596, 1600 (Fed. Cir. 1988) (evidence of teaching or suggestion "essential" to avoid hindsight); *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 227 USPQ 657, 667 (Fed. Cir. 1985) (district court's conclusion of obviousness was in error when it "did not elucidate any factual teachings, suggestions or incentives from this prior art that showed the propriety of combination").

Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability--the essence of hindsight. *Interconnect Planning Corp. v. Feil*, 227 USPQ 543, 547 (Fed. Cir. 1985) ("The invention must be viewed not with the blueprint drawn by the inventor, but in the state of the art that existed at the time."); *Diversitec Corp. v. Century Steps, Inc.*, 850 F.2d 675 (Fed. Cir. 1988).

The motivation, suggestion or teaching may come explicitly from statements in the prior art, the knowledge of one of ordinary skill in the art, or, in some cases, the nature of the problem to be solved. *Dembiczak*, 50 USPQ2d at 1617. In addition, the teaching, motivation or suggestion may be implicit from the prior art as a whole, rather than expressly stated in the references. *WMS Gaming*,

*Inc. v. International Game Tech.*, 51 USPQ2d 1385, 1397 (Fed. Cir. 1999). The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art. *In re Keller*, 208 USPQ 871, 881 (CCPA 1981).

Irrespective of whether express or implicit showings are relied upon to reject claims under Section 103, there must be provided particular findings related thereto. *Dembiczak*, 50 USPQ2d at 1617. Broad conclusory statements standing alone are not "evidence" of obviousness. *Id.*, *See also McElmurry v. Arkansas Power & Light Co.*, 27 USPQ2d 1129, 1131 (Fed. Cir. 1993); *In re Sichert*, 196 USPQ 209, 217 (CCPA 1977).

As will be established below, the examiner has not properly established a *prima facie* case of obviousness against any of the pending claims. Indeed, the rejection of the claims in the Final Office Action represents a classic example of hindsight reconstruction of a dental implant defined in the claims on appeal.

## **2. Patentably Distinct Claims 38 and 61**

As discussed above, the molded plastic container defined in the independent claims on appeal include several limitations that are not disclosed, taught or suggested by Prevot. Appellant submits that for at least the reasons discussed above, the independent claims on appeal are not obvious in view of Prevot.

Collette and the APA were only cited to disclose containers having a champagne-type base. Neither Collette or the APA include any teaching regarding a non-circular anti-rotation flange. As such, neither Collette or the APA can be used to overcome the deficiencies of Prevot as discussed above. Appellant submits that dependent claims 38 and 61 which depend on independent claims 28 and 51 respectively, are not obvious in view of Prevot in combination with either Collette or the

APA.

**C. THE THIRD ISSUE**

The examiner's final rejection of claims 28-42, 51-65 and 74-84 under 35 U.S.C. §103(a) as being unpatentable over Collette 4,755,404 in view of either Pree D192,942 or Japanese Publication No. 6-247432 is in error. Collette in combination with either Pree or JP 432 do not disclose, teach or suggest the molded plastic container as defined in claims 28-42, 51-65 and 74-84.

**1. Collette in combination with Pree Do Not Disclose, Teach or Suggest the Claimed Invention**

Appellant submits that Collette in combination with Pree do not disclose, teach, or suggest a molded plastic container that satisfies all the limitations of claims 28-42, 51-65 and 74-84.

**a. The Nonobvious Independent Claims**

Collette discloses a container that includes a standard circular flange. The examiner admitted in the Final Office that Collette does not disclose or teach a non-circular flange or a flange with one or more straight surfaces on the outer peripheral edge of the flange. The examiner cited Pree in combination with Collette to overcome the deficiencies of Collette regarding the flange. Pree is a design patent for a decanter. A decanter is typically a non-plastic container that is used to hold expensive types of consumable alcohol (e.g., brandy, etc.). The decanter disclosed in Pree has a body configuration that is contrary to the container configuration defined in independent claims 24, 51 and 74. Specifically, Pree does not disclose a container that has a substantially cylindrical sidewall portion. Pree also does not disclose a container with a neck having 1) a substantially circular cross-sectional shape or 2) at least one thread. As such, it is not apparent to Appellant the motivation of one skilled in the art to take any feature of Pree and combine such feature with Collette. Indeed, Appellant submits that the only motivation for such a combination would be the teachings from Appellant's own application.

Appellant further submits that even if one skilled in the art combined any teaching from Pree with Collette, the combined teaching would still not make obvious the molded plastic container defined in the independent claims. Independent claims 28, 51 and 74 all include the limitation that the molded plastic bottle includes an upper mouth forming portion that includes a neck that has 1) at least one thread and 2) a non-circular anti-rotation flange that is formed of a) a plurality of substantially straight surfaces totaling an odd number and b) the substantially straight surfaces are symmetrically oriented about the anti-rotation flange. Pree discloses a flange on a decanter having ten straight edges. The ten sided flange disclosed in Pree does not teach a flange having an odd number of straight surfaces. The examiner briefly addresses this deficiency of Pree by asserting that it would have been obvious to one of ordinary skill in the art to provide a flange with an “odd” number of straight sides. However, the examiner failed to explain the source of the motivation to make a flange with an odd number of straight sides. Appellant resubmits that the only motivation for such motivation would be the teachings from Appellant’s own application.

For at least the reasons set forth above, none of the independent claims on appeal are obvious in view of Collette and Pree.

Independent claim 51 includes additional limitations directed to a plurality of apexes that total an odd number and which are portioned on the outer peripheral edge of the anti-rotation flange and formed by the ends of two adjacent portioned straight surfaces. Claim 51 also includes the limitation that at least one of the apexes is portioned on the outer peripheral edge of the anti-rotation flange such that it is diametrically opposed to a center of a substantially straight surface. Arguably, Pree discloses a plurality of apexes on the flange; however, the number of apexes is ten, an even number. Pree also does not disclose that any of the ten apexes are positioned diametrically opposed to a substantially straight surface that is positioned on the outer peripheral edge of the anti-rotation

flange. For at least these further reasons, Collette in combination with Pree do not make obvious independent claim 51 and any claim dependent therefrom.

**b. The Nonobvious Dependent Claims**

As set forth above, all three independent claims on appeal are not obvious in view of Collette and Pree. As such, all the claims dependent from these independent claims are also not obvious over Collette in view of Pree. Appellant further submits that the limitations of dependents claims 36, 37, 57-60, 76 and 81 are also not obvious over Collette in view of Pree.

Dependant claim 36, 37, 59, 60 and 81 include the limitation that the anti-rotation flange has an outer perimeter in a shape of a heptagon. Collette discloses a circular flange and Pree discloses a ten sided flange. Appellant submits that other than Appellant's own application, there is no motivation from the combined teachings of Collette and Pree to form an anti-rotation flange that has an outer perimeter in a shape of a heptagon. The examiner asserted that the selection of an "odd" number of flanges would have been obvious to one skill in the art. Appellant disagrees. The odd number of substantially straight sides on the anti-rotation flange was selected by Appellant to solve three principle problems, namely, 1) inhibiting or preventing the rotation of the container during the capping process (P. 6, ln. 26 - P. 7, ln. 4), 2) supporting the container by a flange during the capping process to inhibit or prevent damage to the base of the container and/or other disfigurements to the container (P. 7, ln. 4 - 24; P. 9, ln. 8 - P. 10, ln. 12), and 3) inhibiting or preventing the container from falling off or otherwise disengaging from a guide rail during the capping and filling process (P. 8, ln. 14 - P. 9, ln. 7). Neither Collette or Pree disclose, teach or suggest that the disclosed containers are designed in any way to address any of these three objectives. As such, the examiner's conclusory statement that it would have been obvious to select an "odd" number of straight sides on the anti-rotation flange is without merit. For at least these further reasons, Collette in combination

with Pree do not make obvious dependent claims 36, 37, 59, 60 and 81.

Dependent claims 57, 58 and 76 include the limitation that at least two of the apexes on the outer peripheral edge of the anti-rotation flange are diametrically opposed from a center of at least two of the substantially straight surfaces on the outer peripheral edge of the anti-rotation flange. Collette does not include any apex on the flange. Pree discloses ten apexes on the flange; however, none of the apexes are diametrically opposed from a center of a substantially straight surface. The examiner made no comment in the Final Office action regarding the orientation of apexes on the non-rotation flange. This is not necessarily surprising since Collette in combination with Pree does not disclose, teach or suggest the apex arrangement defined in these claims. Only Appellant's own application includes such a teaching. For at least these further reasons, Collette in combination with Pree do not make obvious dependent claims 57, 58 and 71.

Claims 59 and 60 include the limitation that the anti-rotation flange has an outer perimeter that has seven apexes. Collette does not include any apex on the flange. Pree discloses ten apexes on the flange, not seven. The examiner made no comment in the Final Office action regarding the number of apexes on the non-rotation flange. Appellant submits that Collette in combination with Pree does not disclose, teach or suggest seven apexes on the anti-rotation flange. Only Appellant's own application includes such a teaching. For at least these further reasons, Collette in combination with Pree do not make obvious dependent claims 59 and 60.

Claim 76 includes the limitation that the anti-rotation flange has an outer perimeter with an odd number of apexes. Collette does not include any apex on the flange. Pree discloses ten apexes on the flange, an even number. As stated above, the examiner made no comment in the Final Office action regarding the number of apexes on the non-rotation flange. Appellant submits that Collette in combination with Pree does not disclose, teach or suggest an odd number of apexes on the anti-

rotation flange. Only Appellant's own application includes such a teaching. For at least these further reasons, Collette in combination with Pree do not make obvious dependent claim 76.

**2. Collette in combination with JP 432 Do Not Disclose, Teach or Suggest the Claimed Invention**

Appellant submits that Collette in combination with JP 432 do not disclose, teach, or suggest a molded plastic container that satisfies all the limitations of claims 28-42, 51-65 and 74-84.

**a. The Nonobvious Independent Claims**

As previously discussed above, Collette discloses a container that includes a standard circular flange. Collette does not disclose or teach a non-circular flange or a flange with one or more straight surfaces on the outer peripheral edge of the flange. The examiner cited JP 432 in combination with Collette to overcome the deficiencies of Collette regarding the flange. JP 432 is a Japanese publication that was cited by the examiner. The examiner did not provide Appellant with a translation of JP 093, thus the analysis of JP 093 is limited to the Figures of JP 093. Figure 1 of JP 432 discloses some type of container 10 that has a lower portion 12 with a generally square cross-sectional shape and a neck 14 that includes a flange 14B and a thread 14. Figure 3 appears to be the container of Figure 1 in a collapsed state. Similar to the deficiencies of Pree set forth above, JP 432 has a body configuration that is contrary to the container configuration defined in independent claims 24, 51 and 74. Specifically, Figures 1 and 3 of JP 432 do not disclose a container that has a substantially cylindrical sidewall portion. As such, it is not apparent to Appellant the motivation of one skilled in the art to take any feature of JP 432 and combine such feature with Collette. Indeed, Appellant submits that the only motivation for such a combination would be the teachings from Appellant's own application.

Appellant further submits that even if one skilled in the art combined any teaching from JP 432 with Collette, the combined teaching would still not make obvious the molded plastic container

defined in the independent claims. Independent claims 28, 51 and 74 all include the limitation that the molded plastic bottle include an upper mouth forming portion that includes a neck that has 1) at least one thread and 2) a non-circular anti-rotation flange that is formed of a) a plurality of substantially straight surfaces totaling an odd number and b) the substantially straight surfaces are symmetrically oriented about the anti-rotation flange. JP 432 discloses a flange on a container having six straight edges. The six sided flange disclosed in JP 432 does not teach a flange having an odd number of straight surfaces. The examiner briefly addresses this deficiency of JP 432 by asserting that it would have been obvious to one of ordinary skill in the art to provide a flange with an “odd” number of straight sides. However, the examiner once again failed to explain the source of the motivation to make a flange with an odd number of straight sides. Appellant resubmits that the only motivation for such motivation would be the teachings from Appellant’s own application.

For at least the reasons set forth above, none of the independent claims on appeal are obvious in view of Collette and JP 432.

Independent claim 51 includes additional limitations directed to a plurality of apexes that total an odd number and which are portioned on the outer peripheral edge of the anti-rotation flange and formed by the ends of two adjacent portioned straight surfaces. Claim 51 also includes the limitation that at least one of the apexes is portioned on the outer peripheral edge of the anti-rotation flange such that it is diametrically opposed to a center of a substantially straight surface. Arguably, JP 432 discloses a plurality of apexes on the flange; however, the number of apexes is six, an even number. JP 432 also does not disclose that any of the six apexes are positioned diametrically opposed to a substantially straight surface that is positioned on the outer peripheral edge of the anti-rotation flange. For at least these further reasons, Collette in combination with JP 432 do not make obvious independent claim 51 and any claim dependent therefrom.

**b. The Nonobvious Dependent Claims**

As set forth above, all three independent claims on appeal are not obvious in view of Collette and JP 432. As such, all the claims dependent from these independent claims are also not obvious over Collette in view of JP 432. Appellant further submits that the limitations of dependents claims 36, 37, 57-60, 76 and 81 are also not obvious over Collette in view of JP 432.

Dependant claim 36, 37, 59, 60 and 81 include the limitation that the anti-rotation flange has an outer perimeter in a shape of a heptagon. Collette discloses a circular flange and JP 432 discloses a six sided or hexagon shaped flange. Appellant submits that other than Appellant's own application, there is no motivation from the teachings the combined teachings of Collette and JP 432 to form an anti-rotation flange that has an outer perimeter in a shape of a heptagon. The examiner again asserted that the selection of an "odd" number of flanges would have been obvious to one skilled in the art. Appellant once again disagrees. As stated above, the odd number of substantially straight sides on the anti-rotation flange was selected by Appellant to solve three principle problems, namely, 1) inhibiting or preventing the rotation of the container during the capping process, 2) supporting the container by a flange during the capping process to inhibit or prevent damage to the base of the container and/or other disfigurements to the container, and 3) inhibiting or preventing the container from falling off or otherwise disengaging from a guide rail during the capping and filling process. Neither Collette or JP 432 disclose, teach or suggest that the disclosed containers are designed in any way to address any of these three objectives. As such, the examiner's conclusory statement that it would have been obvious to select an "odd" number of straight sides on the anti-rotation flange is without merit. For at least these further reasons, Collette in combination with JP 432 do not make obvious dependent claims 36, 37, 59, 60 and 81.

Dependent claims 57, 58 and 76 include the limitation that at least two of the apexes on the outer peripheral edge of the anti-rotation flange are diametrically opposed from a center of at least two of the substantially straight surfaces on the outer peripheral edge of the anti-rotation flange. Collette does not include any apex on the flange. JP 432 discloses six apexes on the flange; however, none of the apexes are diametrically opposed from a center of a substantially straight surface. The examiner made no comment in the Final Office action regarding the orientation of apexes on the non-rotation flange. Once again, this is not necessarily surprising since Collette in combination with JP 432 does not disclose, teach or suggest the apex arrangement defined in these claims. Only Appellant's own application includes such a teaching. For at least these further reasons, Collette in combination with JP 432 do not make obvious dependent claims 57, 58 and 71.

Claims 59 and 60 include the limitation that the anti-rotation flange has an outer perimeter that has seven apexes. Collette does not include any apex on the flange. JP 432 discloses six apexes on the flange, not seven. The examiner made no comment in the Final Office action regarding the number of apexes on the non-rotation flange. Appellant submits that Collette in combination with JP 432 do not disclose, teach or suggest seven apexes on the anti-rotation flange. Only Appellant's own application includes such a teaching. For at least these further reasons, Collette in combination with JP 432 do not make obvious dependent claims 59 and 60.

Claim 76 includes the limitation that the anti-rotation flange has an outer perimeter with an odd number of apexes. Collette does not include any apex on the flange. JP 432 discloses six apexes on the flange, an even number. As stated above, the examiner made no comment in the Final Office action regarding the number of apexes on the non-rotation flange. Appellant submits that Collette in combination with JP 432 do not disclose, teach or suggest an odd number of apexes on the anti-rotation flange. Only Appellant's own application includes such a teaching. For at least

these further reasons, Collette in combination with Pree do not make obvious dependent claim 76.

#### **D. THE FOURTH ISSUE**

The examiner's final rejection of claims 28-37, 42, 51-60 and 74-76 under 35 U.S.C. §103(a) as being unpatentable over Japanese Publication No. 61-93093 in view of either Pree D192,942 or Japanese Publication No. 6-247432 is in error. JP 093 in combination with either Pree or JP 432 do not disclose, teach or suggest the molded plastic container as defined in claims 28-37, 42, 51-60 and 74-76.

##### **1. JP 093 in combination with Pree Do Not Disclose, Teach or Suggest the Claimed Invention**

Appellant submits that JP 093 in combination with Pree do not disclose, teach, or suggest a molded plastic container that satisfies all the limitations of claims 28-37, 42, 51-60 and 74-76.

###### **a. The Nonobvious Independent Claims**

JP 093 discloses several types of containers 1 that include various flange configurations in Figures 2, 3 and 5. JP 093 is a Japanese publication that was cited by the examiner. The examiner did not provide Appellant with a translation of JP 093, thus the analysis of JP 093 is limited to the Figures of JP 093. Figures 2A-B of JP 093 discloses a flange 9 that includes a plurality of curvilinear structures or indentations 13 on less than half of the outer peripheral edge of the flange. The remaining portion of the outer peripheral edge of the flange is curved. This particular flange has no substantially straight surfaces on any portion of the outer peripheral edge of the flange. Figure 3A-B of JP 093 discloses a container having a circular flange 9 with a uniform curved outer peripheral edge, which configuration is common in the industry. Spaced from the outer peripheral edge of the flange 9 are a plurality of ribs 13 positioned on a portion of the upper and lower sides of the flange. These ribs are only located on less than half of the circumference of the flange. This particular flange also has no substantially straight surfaces on any portion of the outer peripheral

edge of the flange. Figure 5 of JP 093 discloses a container having a flange 9 that includes a plurality of curvilinear structures 13 on the outer peripheral edge of the flange. These curvilinear structures are positioned uniformly about the outer peripheral edge of the flange. This particular flange also has no substantially straight surfaces on any portion of the outer peripheral edge of the flange.

The examiner acknowledged that JP 093 does not disclose, teach or suggest a plastic molded container that has 1) a flange with straight surfaces on the outer peripheral edge of the flange and/or 2) a flange with an odd number of straight surfaces on the outer peripheral edge. The examiner cited Pree in combination with JP 093 to overcome the deficiencies of JP 093 regarding the flange. As stated above, Pree is a design patent for a decanter. This decanter is typically a non-plastic container that is used to hold expensive types of consumable alcohol. The decanter disclosed in Pree has a body configuration that is contrary to the container configuration defined in independent claims 51 and 74. Specifically, Pree does not disclose a container that has a substantially cylindrical sidewall portion. Pree also does not disclose a container with a neck having 1) a substantially circular cross-sectional shape or 2) at least one thread. As such, it is not apparent to Appellant the motivation of one skilled in the art to take any feature of Pree and combine such feature with JP 093. JP 093 discloses several flange configurations that are apparently used to inhibit rotation of the container during a capping processes. It is therefore unclear why one skilled in the art would further modify the flange of JP 093 based on a design patent for a decanter. Indeed, Appellant submits that the only motivation for such a combination would be the teachings from Appellant's own application.

Appellant further submits that even if one skilled in the art combined any teaching from Pree with JP 093, the combined teaching would still not make obvious the molded plastic container defined in the independent claims. Independent claims 28, 51 and 74 all include the limitation that

the molded plastic bottle includes an upper mouth forming portion that includes a neck that has 1) at least one thread and 2) a non-circular anti-rotation flange that is formed of a) a plurality of substantially straight surfaces totaling an odd number and b) the substantially straight surfaces are symmetrically oriented about the anti-rotation flange. Pree discloses a flange on a decanter having ten straight edges. The ten sided flange disclosed in Pree does not teach a flange having an odd number of straight surfaces. The examiner briefly addresses this deficiency of Pree by asserting that it would have been obvious to one of ordinary skill in the art to provide a flange with an “odd” number of straight sides. However, the examiner failed to explain the source of the motivation to make a flange with an odd number of straight sides. Appellant resubmits that the only motivation for such motivation would be the teachings from Appellant’s own application.

For at least the reasons set forth above, none of the independent claims on appeal are obvious in view of JP 093 and Pree.

Independent claim 51 includes additional limitations directed to a plurality of apexes that total an odd number and which are portioned on the outer peripheral edge of the anti-rotation flange and formed by the ends of two adjacent portioned straight surfaces. Claim 51 also includes the limitation that at least one of the apexes is portioned on the outer peripheral edge of the anti-rotation flange such that it is diametrically opposed to a center of a substantially straight surface. Arguably, Pree discloses a plurality of apexes on the flange; however, the number of apexes is ten, an even number. Pree also does not disclose that any of the ten apexes are positioned diametrically opposed to a substantially straight surface that is positioned on the outer peripheral edge of the anti-rotation flange. For at least these further reasons, JP 093 in combination with Pree do not make obvious independent claim 51 and any claim dependent therefrom.

**b. The Nonobvious Dependent Claims**

As set forth above, the independent claims on appeal are not obvious in view of JP 093 and Pree. As such, all the claims dependent from these independent claims are also not obvious over JP 093 in view of Pree. Appellant further submits that the limitations of dependents claims 36, 37, 57-60 and 76 are also not obvious over JP 093 in view of Pree.

Dependant claim 36, 37, 59, and 60 include the limitation that the anti-rotation flange has an outer perimeter in a shape of a heptagon. JP 093 discloses a three flange configuration that do not include any straight surfaces on the outer peripheral edge of the flange. Pree discloses a ten sided flange. Appellant submits that other than Appellant's own application, there is not motivation from the teachings the combined teachings of JP 093 and Pree to form an anti-rotation flange that has an outer perimeter in a shape of a heptagon. The examiner asserted that the selection of an "odd" number of flanges would have been obvious to one skill in the art. Appellant disagrees as set forth above. The odd number of substantially straight sides on the anti-rotation was selected by Appellant to solve three principle problems, namely, 1) inhibiting or preventing the rotation of the container during the capping process, 2) supporting the container by a flange during the capping process to inhibit or prevent damage to the base of the container and/or other disfigurements to the container, and 3) inhibiting or preventing the container from falling off or otherwise disengaging from a guide rail during the capping and filling process. Pree does not disclose, teach or suggest that the disclosed decanter is designed in any way to address any of these three objectives. Arguably, JP 093 only discloses a flange configuration that is designed to meet the first objective. As such, the examiner's conclusory statement that it would have been obvious to select an "odd" number of straight sides on the anti-rotation flange is without merit. For at least these further reasons, JP 093 in combination

with Pree do not make obvious dependent claims 36, 37, 59 and 60.

Dependent claims 57, 58 and 76 include the limitation that at least two of the apexes on the outer peripheral edge of the anti-rotation flange are diametrically opposed from a center of at least two of the substantially straight surfaces on the outer peripheral edge of the anti-rotation flange. JP 093 does not include any apexes on the flange that are formed by substantially straight surfaces. Pree discloses ten apexes on the flange; however, none of the apexes are diametrically opposed from a center of a substantially straight surface. The examiner made no comment in the Final Office action regarding the orientation of apexes on the non-rotation flange. This is not necessarily surprising since JP 093 in combination with Pree does not disclose, teach or suggest the apex arrangement defined in these claims. Only Appellant's own application includes such a teaching. For at least these further reasons, JP 093 in combination with Pree do not make obvious dependent claims 57, 58 and 71.

Claims 59 and 60 include the limitation that the anti-rotation flange has an outer perimeter that has seven apexes. As stated above, JP 093 does not include any apexes on the flange that are formed by substantially straight surfaces. Pree discloses ten apexes on the flange, not seven. The examiner made no comment in the Final Office action regarding the number of apexes on the non-rotation flange. Appellant submits that JP 093 in combination with Pree does not disclose, teach or suggest seven apexes on the anti-rotation flange. Only Appellant's own application includes such a teaching. For at least these further reasons, JP 093 in combination with Pree do not make obvious dependent claims 59 and 60.

Claim 76 includes the limitation that the anti-rotation flange has an outer perimeter with an odd number of apexes. JP 093 does not include any apexes on the flange that are formed by substantially straight surfaces. Pree discloses ten apexes on the flange, an even number. As stated

above, the examiner made no comment in the Final Office action regarding the number of apexes on the non-rotation flange. Appellant submits that JP 093 in combination with Pree does not disclose, teach or suggest an odd number of apexes on the anti-rotation flange. Only Appellant's own application includes such a teaching. For at least these further reasons, JP 093 in combination with Pree do not make obvious dependent claim 76.

**2. JP 093 in combination with JP 432 Do Not Disclose, Teach or Suggest the Claimed Invention**

Appellant submits that JP 093 in combination with JP 432 do not disclose, teach, or suggest a molded plastic container that satisfies all the limitations of claims 28-37, 42, 61-60, 65 and 74-76.

**a. The Nonobvious Independent Claims**

As previously discussed above, JP 093 discloses several types of containers 1 that include various flange configurations in Figures 2, 3 and 5. None of the disclosed flange configurations have substantially straight surfaces on any portion of the outer peripheral edge of the flange. The examiner admitted this deficiency of JP 093 and cited JP 432 in combination with JP 093 to overcome this deficiency of JP 093.

As set forth above, JP 432 is a Japanese publication that was cited by the examiner. The examiner did not provide Appellant with a translation of JP 093, thus the analysis of JP 093 is limited to the Figures of JP 093. Figure 1 of JP 432 disclose some type of container 10 that has lower portion 12 with a generally square cross-sectional shape and a neck 14 that includes a flange 14B and a thread 14. Figure 3 appears to be the container of Figure 1 in a collapsed state. JP 432 discloses a container that has a body configuration that is contrary to the container configuration defined in independent claims 24, 51 and 74. Specifically, Figures 1 and 3 of JP 432 do not disclose a container that has a substantially cylindrical sidewall portion. As such, it is not apparent to Appellant the motivation of one skilled in the art to take any feature of JP 432 and combine such

feature with JP 093. Indeed, Appellant submits that the only motivation for such a combination would be the teachings from Appellant's own application.

Appellant further submits that even if one skilled in the art combined any teaching from JP 432 with JP 093, the combined teaching would still not make obvious the molded plastic container defined in the independent claims. Independent claims 28, 51 and 74 all include the limitation that the molded plastic bottle includes an upper mouth forming portion that includes a neck that has 1) at least one thread and 2) a non-circular anti-rotation flange that is formed of a) a plurality of substantially straight surfaces totaling an odd number and b) the substantially straight surfaces are symmetrically oriented about the anti-rotation flange. JP 432 discloses a flange on a container having six straight edges. The six sided flange disclosed in JP 432 does not teach a flange having an odd number of straight surfaces. The examiner briefly addresses this deficiency of JP 432 by asserting that it would have been obvious to one of ordinary skill in the art to provide a flange with an "odd" number of straight sides. However, the examiner once again failed to explain the source of the motivation to make a flange with an odd number of straight sides. Appellant resubmits that the only motivation for such motivation would be the teachings from Appellant's own application.

For at least the reasons set forth above, none of the independent claims on appeal are obvious in view of JP 093 and JP 432.

Independent claim 51 includes additional limitations directed to a plurality of apexes that total an odd number and which are portioned on the outer peripheral edge of the anti-rotation flange and formed by the ends of two adjacent portioned straight surfaces. Claim 51 also includes the limitation that at least one of the apexes is portioned on the outer peripheral edge of the anti-rotation flange such that it is diametrically opposed to a center of a substantially straight surface. Arguably, JP 432 discloses a plurality of apexes on the flange; however, the number of apexes is six, an even

number. JP 432 also does not disclose that any of the six apexes are positioned diametrically opposed to a substantially straight surface that is positioned on the outer peripheral edge of the anti-rotation flange. For at least these further reasons, JP 093 in combination with JP 432 do not make obvious independent claim 51 and any claim dependent therefrom.

**b. The Nonobvious Dependent Claims**

As set forth above, all three independent claims on appeal are not obvious in view of JP 093 and JP 432. As such, all the claims dependent from these independent claims are also not obvious over JP 093 in view of JP 432. Appellant further submits that the limitations of dependents claims 36, 37, 57-60 and 76 are also not obvious over JP 093 in view of JP 432.

Dependent claims 36, 37, 59 and 60 include the limitation that the anti-rotation flange has an outer perimeter in a shape of a heptagon. JP 093 discloses a three flange configuration that does not include any straight surfaces on the outer peripheral edge of the flange. JP 432 discloses a six sided or hexagon shaped flange. Appellant submits that other than Appellant's own application, there is no motivation from the combined teachings of JP 093 and JP 432 to form an anti-rotation flange that has an outer perimeter in a shape of a heptagon. The examiner again asserted that the selection of an "odd" number of flanges would have been obvious to one skilled in the art. Appellant once again disagrees. As stated above, the odd number of substantially straight sides on the anti-rotation flange was selected by Appellant to solve three principle problems, namely, 1) inhibiting or preventing the rotation of the container during the capping process, 2) supporting the container by a flange during the capping process to inhibit or prevent damage to the base of the container and/or other disfigurements to the container, and 3) inhibiting or preventing the container from falling off or otherwise disengaging from a guide rail during the capping and filling process. JP 432 does not disclose, teach or suggest that the disclosed container is designed in any way to address any

of these three objectives. Arguably, JP 093 only discloses a flange configuration that is designed to meet the first objective. As such, the examiner's conclusory statement that it would have been obvious to select an "odd" number of straight sides on the anti-rotation flange is without merit. For at least these further reasons, JP 093 in combination with JP 432 do not make obvious dependent claims 36, 37, 59 and 60.

Dependent claims 57, 58 and 76 include the limitation that at least two of the apexes on the outer peripheral edge of the anti-rotation flange are diametrically opposed from a center of at least two of the substantially straight surfaces on the outer peripheral edge of the anti-rotation flange. JP 093 does not include any apexes on the flange that are formed by substantially straight surfaces. JP 432 discloses six apexes on the flange; however, none of the apexes are diametrically opposed from a center of a substantially straight surface. The examiner made no comment in the Final Office action regarding the orientation of apexes on the non-rotation flange. Once again, this is not necessarily surprising since JP 093 in combination with JP 432 does not disclose, teach or suggest the apex arrangement defined in these claims. Only Appellant's own application includes such a teaching. For at least these further reasons, JP 093 in combination with JP 432 do not make obvious dependent claims 57, 58 and 71.

Claims 59 and 60 include the limitation that the anti-rotation flange has an outer perimeter that has seven apexes. JP 093 does not include any apexes on the flange that are formed by substantially straight surfaces. JP 432 discloses six apexes on the flange, not seven. The examiner made no comment in the Final Office action regarding the number of apexes on the non-rotation flange. Appellant submits that JP 093 in combination with JP 432 do not disclose, teach or suggest seven apexes on the anti-rotation flange. Only Appellant's own application includes such a teaching. For at least these further reasons, JP 093 in combination with JP 432 do not make obvious dependent

claims 59 and 60.

Claim 76 includes the limitation that the anti-rotation flange has an outer perimeter with an odd number of apexes. JP 093 does not include any apexes on the flange that are formed by substantially straight surfaces. JP 432 discloses six apexes on the flange, an even number. As stated above, the examiner made no comment in the Final Office action regarding the number of apexes on the non-rotation flange. Appellant submits that JP 093 in combination with JP 432 do not disclose, teach or suggest an odd number of apexes on the anti-rotation flange. Only Appellant's own application includes such a teaching. For at least these further reasons, JP 093 in combination with Pree do not make obvious dependent claim 76.

#### **E. THE FIFTH ISSUE**

The examiner's final rejection of claims 38-41, 61-64, 82, 83 and 84 under 35 U.S.C. §103(a) as being unpatentable over Japanese Publication No. 61-93093 in view of either Collette 4,755,404 or the admitted prior art is in error. JP 093 in combination with either Collette or the APA does not disclose, teach or suggest the molded plastic container as defined in claims 38-41, 61-64, 82, 83 and 84.

As discussed above, the molded plastic container defined in the independent claims on appeal include several limitations that are not disclosed, taught or suggested by JP 093. Appellant submits that for at least the reasons discussed above, the independent claims on appeal are not obvious in view of JP 093.

Collette and the APA were only cited to disclose containers having a champagne-type base and formed of PET. Neither Collette or the APA include any teaching regarding a non-circular anti-rotation flange. As such, neither Collette or the APA can be used to overcome the deficiencies of JP 093 as discussed above. Appellant submits that dependent claims 38-41, 61-64, 82, 83 and 84

which depend on independent claims 28, 51 and 74 respectively are not obvious in view of JP 043 in combination with either Collette or the APA.

**L. SUMMARY**

In conclusion, the claims on appeal pertain to a novel molded plastic container. Appellant submits that for at least the reasons set forth above, none of the pending claims in the above-identified patent application are obvious in view of the cited art of record. Appellant respectfully requests that the rejection of the claims be withdrawn and that such claims be indicated as allowable.

## VIII. CLAIMS APPENDIX

28. A molded plastic container comprising an upper mouth-forming portion, a lower base-forming portion and a substantially cylindrical sidewall portion extending between said upper mouth-forming portion and said lower base portion, said upper mouth-forming portion including a neck having at least one thread to secure a cap to said upper mouth forming portion and a non-circular anti-rotation flange to at least partially inhibit full rotation of said container as the cap is inserted on said container, said non-circular anti-rotation flange including an outer peripheral edge at least partially formed of a plurality of substantially straight surfaces totaling an odd number, said straight surfaces symmetrically oriented about said non-circular anti-rotation flange.

29. The plastic container as defined in claim 28, wherein said plurality of substantially straight surfaces each has substantially a same length and each substantially symmetrically oriented about said non-circular anti-rotation flange.

30. The plastic container as defined in claim 28, wherein each of said substantially straight surfaces has two ends, a plurality of said substantially straight surfaces having at least one of said ends engaging an end of an adjacently positioned substantially straight surface.

31. The plastic container as defined in claim 29, wherein each of said substantially straight surfaces has two ends, a plurality of said substantially straight surfaces having at least one of said ends engaging an end of an adjacently positioned substantially straight surface.

32. The plastic container as defined in claim 28, wherein said upper mouth-forming

portion includes a frustoconical transition portion extending between said substantially cylindrical sidewall portion and said neck, said neck having a substantially circular cross-sectional shape.

33. The plastic container as defined in claim 31, wherein said upper mouth-forming portion includes a frustoconical transition portion extending between said substantially cylindrical sidewall portion and said neck, said neck having a substantially circular cross-sectional shape.

34. The plastic container as defined in claim 32, wherein said non-circular anti-rotation flange is positioned between said frustoconical transition portion and said at least one thread.

35. The plastic container as defined in claim 33, wherein said non-circular anti-rotation flange is positioned between said frustoconical transition portion and said at least one thread.

36. The plastic container as defined in claim 28, wherein said anti-rotation flange has an outer perimeter in a shape of a heptagon.

37. The plastic container as defined in claim 35, wherein said anti-rotation flange has an outer perimeter in a shape of a heptagon.

38. The plastic container as defined in claim 28, wherein said lower base-forming portion has a champagne-type base.

39. The plastic container as defined in claim 37, wherein said lower base-forming portion

has a champagne-type base.

40. The plastic container as defined in claim 28, wherein said plastic is polyethylene terephthalate.

41. The plastic container as defined in claim 39, wherein said plastic is polyethylene terephthalate.

42. The plastic container as defined in claim 28, wherein said container is for beverages.

51. A molded plastic container comprising an upper mouth-forming portion, a lower base-forming portion and a substantially cylindrical sidewall portion extending between said upper mouth-forming portion and said lower base portion, said upper mouth-forming portion including a neck having a substantially circular cross-sectional shape and at least one thread to secure a cap to said upper mouth forming portion and a non-circular anti-rotation flange, said non-circular anti-rotation flange including an outer peripheral edge at least partially formed of a plurality of substantially straight surfaces totaling an odd number and a plurality of apexes totaling an odd number, each of said apexes formed by ends of two of said substantially straight surfaces that are positioned adjacent to one another, at least one of said apexes diametrically opposed from a center of at least one of said substantially straight surfaces, said anti-rotation flange at least partially extending outwardly from said neck and at least partially inhibiting full rotation of said container as a cap is inserted on said container.

52. The plastic container as defined in claim 51, wherein said plurality of substantially straight surfaces each have substantially a same length and each substantially symmetrically oriented about said non-circular anti-rotation flange.

53. The plastic container as defined in claim 51, wherein said upper mouth-forming portion includes a frustoconical transition portion extending between said substantially cylindrical sidewall portion and said neck, said neck having a substantially circular cross-sectional shape.

54. The plastic container as defined in claim 52, wherein said upper mouth-forming portion includes a frustoconical transition portion extending between said substantially cylindrical sidewall portion and said neck, said neck having a substantially circular cross-sectional shape.

55. The plastic container as defined in claim 53, wherein said non-circular anti-rotation flange is positioned between said frustoconical transition portion and said at least one thread.

56. The plastic container as defined in claim 54, wherein said non-circular anti-rotation flange is positioned between said frustoconical transition portion and said at least one thread.

57. The plastic container as defined in claim 51, wherein at least two of said apexes are diametrically opposed from a center of at least two of said substantially straight surfaces.

58. The plastic container as defined in claim 56, wherein at least two of said apexes are diametrically opposed from a center of at least two of said substantially straight surfaces.

59. The plastic container as defined in claim 51, wherein said anti-rotation flange has an outer perimeter in a shape of a heptagon having seven substantially straight surfaces and seven apexes, said substantially straight surfaces and apexes symmetrically oriented about said anti-rotation flange.

60. The plastic container as defined in claim 58, wherein said anti-rotation flange has an outer perimeter in a shape of a heptagon having seven substantially straight surfaces and seven apexes, said substantially straight surfaces and apexes symmetrically oriented about said anti-rotation flange.

61. The plastic container as defined in claim 51, wherein said lower base-forming portion has a champagne-type base.

62. The plastic container as defined in claim 60, wherein said lower base-forming portion has a champagne-type base.

63. The plastic container as defined in claim 51, wherein said plastic is polyethylene terephthalate.

64. The plastic container as defined in claim 62, wherein said plastic is polyethylene terephthalate.

65. The plastic container as defined in claim 51, wherein said container is for beverages.

74. A molded plastic container comprising an upper mouth-forming portion, a lower base-forming portion and a substantially cylindrical sidewall portion extending between said upper mouth-forming portion and said lower base portion, said upper mouth-forming portion including a neck having a substantially circular cross-sectional shape and at least one thread to secure a cap to said upper mouth forming portion and a non-circular anti-rotation flange, said anti-rotation flange at least partially extending outwardly from said neck and at least partially inhibiting full rotation of said container as a cap is inserted on said container, said non-circular anti-rotation flange including an outer peripheral edge at least partially formed of a plurality of substantially straight surfaces totaling an odd number, said plurality of substantially straight surfaces symmetrically oriented about said non-circular anti-rotation flange, each of said substantially straight surfaces having substantially a same length.

75. The plastic container as defined in claim 74, wherein each of said substantially straight surfaces has two ends, a plurality of said substantially straight surfaces having at least one of said ends engaging an end of an adjacently positioned substantially straight surface.

76. The plastic container as defined in claim 75, wherein said non-circular anti-rotation flange includes a plurality of apexes totaling an odd number, each of said apexes formed by ends of two of said substantially straight surfaces that are positioned adjacent to one another, at least two of said apexes diametrically opposed from a center of at least two of said substantially straight surfaces.

79. The plastic container as defined in claim 76, wherein said upper mouth-forming portion includes a frustoconical transition portion extending between said substantially cylindrical

sidewall portion and said neck, said neck having a substantially circular cross-sectional shape.

80. The plastic container as defined in claim 79, wherein said non-circular anti-rotation flange is positioned between said frustoconical transition portion and said at least one thread.

81. The plastic container as defined in claim 80, wherein said anti-rotation flange has an outer perimeter in a shape of a heptagon having seven substantially straight surfaces and seven apexes.

82. The plastic container as defined in claim 81, wherein said lower base-forming portion has a champagne-type base.

83. The plastic container as defined in claim 82, wherein said plastic is polyethylene terephthalate.

84. The plastic container as defined in claim 83, wherein said container is for beverages.

## **IX. EVIDENCE APPENDIX**

The evidence of record in this appeal is U.S. Patent Nos. D192,942; 4,755,404; 5,887,739 and 6,752,284; and Japanese Publication Nos. 61-93093 and 6-247432, all of which were originally cited by the examiner.

## X. RELATED PROCEEDINGS APPENDIX

There are no related proceedings.

Respectfully submitted,  
FAY, SHARPE, FAGAN, MINNICH & MCKEE

By:

BRIAN E. TURUNG  
Reg. No. 35,394  
1100 Superior Avenue, 7<sup>th</sup> Floor  
Cleveland, Ohio 44114-2579  
Telephone: (216) 861-5582  
Facsimile: (216) 241-1666

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450

on 9-13-05

Adeline Marchant  
(SIGNATURE)